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Donald H. Piper

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# PROBLEMS IN THIRD PARTY ACTION PROCEDURE UNDER THE WISCONSIN WORKER'S COMPENSATION ACT

DONALD H. PIPER\*

## INTRODUCTION

Compensation recoverable under Wisconsin's Worker's Compensation Act<sup>1</sup> is not conditioned on the negligence of either the employee or employer. For example, a negligent employee may receive compensation from a non-negligent employer provided other conditions of the Worker's Compensation Act are met.<sup>2</sup>

Wisconsin's Worker's Compensation Act also expressly states that where conditions exist entitling an employee to the right to a recovery of compensation, such recovery shall be the exclusive remedy against the employer and the worker's compensation insurance carrier.<sup>3</sup>

However, while the exclusive remedy provision of Wisconsin's Worker's Compensation Act prevents the employee from maintaining a tort action against his employer and his employer's compensation carrier, the injured employee may, nevertheless, bring suit against a third person whose negligent acts caused the employee's injury. This third party action is expressly permitted in the Wisconsin Worker's Compensation Act.<sup>4</sup> Pursuant to Wisconsin's Worker's Compensation Act, an employee or his employer (or compensation carrier) may make

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\* B.A. 1969, Carthage College; J.D. 1972, University of Wisconsin; Associate with the law firm of Borgelt, Powell, Peterson & Frauen, S.C., Milwaukee, Wisconsin; member of the American, Wisconsin and Milwaukee Bar Associations.

1. Wis. STAT. §102.01 (1973) was amended by Wis. Laws 1975, ch. 200, §58 (effective April 14, 1976), so as to change the title "Workmen's Compensation Act" to "Worker's Compensation Act." Wis. Laws 1975, ch. 147, changes the terminology of the substantive sections of the Act so as to eliminate references to gender. All references to the Act in this article are to the new title "Worker's Compensation Act," and all quotations are taken from the amended statutes.

2. See Wis. STAT. §102.03 (1973); *see also* Milwaukee County v. Department of Industry, Labor and Human Relations, 48 Wis.2d 392, 180 N.W.2d 513 (1970), and American Motors Corp. v. Industrial Comm'n, 1 Wis.2d 261, 271, 83 N.W.2d 714, 720 (1957).

3. Wis. STAT. §102.03(2) (1973); *see also* 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §65.00 (1976).

4. Wis. STAT. §102.29(1) (1973).

a claim or maintain an action in tort against a third party tortfeasor.<sup>5</sup> The theory underlying third party actions is to preserve the traditional fault concept of placing responsibility for damages sustained upon the culpable party.<sup>6</sup>

In the event that there is recovery from the third party tortfeasor, Wisconsin's Worker's Compensation Act provides that such recovery must follow a statutory distribution formula.<sup>7</sup> Under this formula, the employer or its insurance carrier receives reimbursement for payments which it was obligated to make under the Act.<sup>8</sup>

Over the years, a number of procedural and substantive problems have arisen under section 102.29(1)—the section which discusses party joinder, notice requirements, and the distribution of proceeds recovered in a third party action. This article will comment on the differences in the interpretation and application of section 102.29(1) in third party actions commenced prior to January 1, 1976.<sup>9</sup> In addition, this article will discuss the impact which chapter 803 of the new Wisconsin Rules of Civil Procedure<sup>10</sup> has upon third party actions.

### I. THIRD PARTY ACTION PROCEDURE PRIOR TO THE NEW RULES OF CIVIL PROCEDURE

Three aspects of third party action procedure which have plagued attorneys, due to the disparate interpretation and application of section 102.29(1), are party joinder, the necessity for assignment of interests, and the notice to be given to interested parties. The following portion of this article will examine each of these problems.

#### A. *Party Joinder Under Section 102.29(1)*

The question has frequently been raised in third party actions as to whether the compensation carrier or employer who

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5. *Id.* It should be noted that the employee or employer (or compensation carrier) may sue for the full amount, and the distribution formula will prevent double recovery.

6. *Severin v. Luchinske*, 271 Wis. 378, 73 N.W.2d 477 (1955); see also 2A A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §71.00 (1976).

7. WIS. STAT. §102.29(1) (1973).

8. *Id.*

9. The effective date of the new Wisconsin Rules of Civil Procedure is January 1, 1976.

10. The new Wisconsin Rules of Civil Procedure were promulgated by Order of the Wisconsin Supreme Court, dated February 17, 1975, as amended by the court on September 30, 1975, effective January 1, 1976. The rules have been codified by the Revisor of Statutes as chapters 801 through 807 of the Wisconsin Statutes.

has paid benefits is a "necessary" or "indispensable" party, and, conversely, whether in an action commenced by the employer or compensation carrier for benefits paid under the Act to the injured employee, the injured employee must be joined as a necessary or indispensable party.<sup>11</sup>

Section 102.29(1) of the Wisconsin Statutes provides in part:

If notice is given as provided in this subsection, the liability of the tort-feasor shall be determined as to all parties having a right to make claim, and irrespective of whether or not all parties join in prosecuting such claim, the proceeds of such claim shall be divided as follows . . . .

Under the above statutory language, if notice is given, all parties having a right to make a claim should receive the section 102.29 distribution even if not joined as parties. This conclusion is supported not only by the clear language of the statute, but also by case law construing section 102.29(1).

In *Holmgren v. Strebig*,<sup>12</sup> the defendants and third party plaintiffs opposed the worker's compensation insurer's motion for summary judgment of dismissal arguing that the insurer was an indispensable party by virtue of payments made by it as the worker's compensation insurer. Rejecting this argument, the court stated:

Under the Wisconsin statutes . . . the compensation insurer may intervene or prosecute a third party claim, but there is no requirement that the compensation insurer be joined as a party plaintiff.<sup>13</sup>

The *Holmgren* decision relied on *Johannsen v. Peter P. Woboril, Inc.*,<sup>14</sup> in which a third party tort-feasor sought to implead the employer in its status as a worker's compensation self-insurer. In upholding the trial court's refusal to grant the motion, the *Johannsen* court stated:

While [the worker's compensation self-insurer] had a substantial interest in the amount of damages the plaintiff should recover and by sec. 102.29(1), Stats., has been given

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11. Wis. STAT. §260.12 (1973) governs joinder of necessary and indispensable parties in actions commenced prior to January 1, 1976. As to actions commenced on or after January 1, 1976, Wis. STAT. §803.03 (1973) governs.

12. 54 Wis.2d 590, 196 N.W.2d 655 (1971).

13. *Id.* at 598, 196 N.W.2d at 659 (emphasis in original).

14. 260 Wis. 341, 51 N.W.2d 53 (1952).

the right to participate in the plaintiff's action to protect that interest, it had served notice that it waived that right. The injured employee's right of action and the amount of damages to which he is entitled are theoretically unaffected by the statutory disposition of the sum which the jury finds will compensate him for his injuries. *Clark v. Chicago, M., St. P. & P.R. Co.* (1934), 214 Wis. 295, 252 N.W. 685. The presence of his employer in his action against the tort-feasor is unnecessary to the determination of the issues and, as the employer had waived its right to participate, we find no error in the denial of the motion to make the employer a party.<sup>15</sup>

The court further held that the employer's decision not to join "only went to its participation in the litigation; the division of such damages as may be awarded is settled by statute [section 102.29(1)]."<sup>16</sup>

*Skornia v. Highway Pavers, Inc.*<sup>17</sup> also provides support for the proposition that section 102.29(1) distribution is available to a nonjoined compensation insurer or employee. *Skornia* addressed the issue of whether a worker's compensation carrier which had made payments to the injured employee - plaintiff was subject to having its employees called adversely for examination at trial by the third party tort-feasor, even though not a party to the action. The court held that the worker's compensation carrier's employees were subject to adverse examination, noting that regardless of whether or not the carrier was a plaintiff in the action, "the proceeds, after deduction of a reasonable cost of collection, must be divided by the injured employee and the payor of the compensation benefits"<sup>18</sup> as prescribed by the distribution formula under section 102.29(1).

The same rule has been clearly enunciated in actions commenced by the employer against the third party tort-

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15. *Id.* at 345-46, 51 N.W.2d at 55 (emphasis in original).

16. *Id.* at 345, 51 N.W.2d at 55. See also *Employers Mut. Liab. Ins. Co. v. Icke*, 225 Wis. 304, 274 N.W. 283 (1937). *Huck v. Chicago, St. P., M. & O. Ry.*, 14 Wis.2d 445, 111 N.W.2d 434 (1961), holds that the statutory formula for distribution of proceeds in a third party action applies to settlements of claims as well as judgments granting monetary awards.

Note that litigants can by consensual stipulation provide for a division of proceeds different from the statutory formula, but the distribution formula of Wis. STAT. § 102.29(1) (1973) is controlling in the absence of such a stipulation. *Rice v. Gruetzmacher*, 30 Wis.2d 222, 140 N.W.2d 238 (1966).

17. 34 Wis.2d 160, 148 N.W.2d 678 (1966).

18. *Id.* at 165, 148 N.W.2d at 680-81.

feasor. *Employers Mutual Liability Insurance Co. v. Icke*<sup>19</sup> holds that "the employee is entitled to share in the recovery against a third party whether the suit be begun by the employee or by the employer or insurance carrier, regardless of joinder by the employee."<sup>20</sup>

In spite of the authority noted above, in some circuits the worker's compensation insurer has been considered a necessary party either as plaintiff or as a nominal defendant. Other courts, in addition, insist on active participation by the attorney for the compensation insurer, simply by virtue of that attorney having filed a notice of statutory interest.

*Insurance Company of North America v. Blinddauers Sheet Metal and Heating Co.*<sup>21</sup> appears to be in contradiction to the above-mentioned state court authority insofar as it holds that an injured employee is an indispensable party in a third party action. However, the case involved a motion to intervene as of right under Federal Rule 24, made by the injured employee, for the purpose of destroying diversity jurisdiction in an action commenced by the compensation carrier against the wishes of the employee. The court found the employee to be an indispensable party on the basis that a contrary finding would create the "anomalous" and "untenable" situation of denying the injured employee his right under section 102.29 to an "equal voice" in the prosecution of his claim since a section 102.29(1) judgment is binding "as to all parties having right to make claim . . . irrespective of whether or not all parties join in prosecuting such claim."<sup>22</sup>

Thus, in spite of clear statutory language and seemingly definitive case law to the effect that distribution of the proceeds according to the statutory formula occurs irrespective of whether or not all parties having a right to make claim are joined in the third party action, the necessity for joinder or participation of the worker's compensation insurance carrier in the third party action has not been uniformly decided.

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19. *Employers Mut. Liab. Ins. Co. v. Icke*, 225 Wis. 304, 274 N.W. 283 (1937).

20. *Id.* at 309, 274 N.W. at 285.

21. 61 F.R.D. 323 (E.D. Wis. 1973). See also *Hraback v. Madison Gas and Elec. Co.*, 240 F.2d 472 (7th Cir. 1957); *Slauson v. Standard Oil Co.*, 29 F. Supp. 497 (E.D. Wis. 1939). Compare *Travelers Ins. Co. v. Northwest Airlines, Inc.*, 94 F. Supp. 620 (W.D. Wis. 1950), with *Murray v. Dewar*, 6 Wis.2d 411, 94 N.W.2d 635 (1959).

22. WIS. STAT. §102.29(1) (1973).

*B. Assignment of Interest as a Condition Precedent to  
Section 102.29 Distribution*

As a result of the Wisconsin Supreme Court decision in *Heifetz v. Johnson*<sup>23</sup> there has been a considerable amount of concern among attorneys handling third party actions as to whether an assignment to the plaintiff by the nonparty compensation carrier is necessary in order to preserve its right to recover amounts paid to the injured employee.

*Heifetz* was an automobile negligence case arising out of an accident which occurred in 1968 resulting in personal injuries to the plaintiff. Heifetz received two thousand dollars for medical expenses from his liability insurer, and, in return, executed a "subrogation receipt and assignment" to the insurer in 1969. Heifetz then commenced a personal injury action against the driver of the other vehicle, eleven days before the statute of limitations was to run, without joining the insurer as a plaintiff. The defendants moved for summary judgment after the eleven day period ran, contending that the insurer was an indispensable party by virtue of its subrogated interest under the 1969 assignment, and further contending that the failure to join this indispensable party within three years following the accident failed to toll the statute of limitations for personal injury actions.<sup>24</sup> Consequently the defendants argued that the entire action was barred by the statute of limitations. The trial court rejected the defendants' arguments and denied the motion for summary judgment, and defendants appealed.

Noting that in Wisconsin "the running of the statute of limitations extinguishes not only the right of action but also the cause of action,"<sup>25</sup> the Supreme Court of Wisconsin held that the insurer had effectively been barred from bringing its cause of action. The court took cognizance of the prior holding in *Patitucci v. Gerhardt*<sup>26</sup> that a liability insurer subrogated by virtue of an assignment was considered an indispensable party, but found that in *Heifetz* the insurer's cause of action was barred by the statute of limitations so that it no longer had any interest in the action and was no longer indispensable.

Then, in the language which has created a great deal of

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23. 61 Wis.2d 111, 211 N.W.2d 834 (1973).

24. Wis. STAT. §893.205(1) (1971).

25. 61 Wis.2d at 115, 211 N.W.2d at 836.

26. 206 Wis. 358, 240 N.W. 385 (1932).

controversy,<sup>27</sup> the court commented broadly in regard to the effect of the insurer's payment of medical expenses:

Acceptance of payment from an insurer operates as an assignment of the claim to that extent whether or not the policy contains a subrogation agreement. The plaintiff loses his right to sue for any amount received from his insurer.<sup>28</sup>

A literal reading of this statement would arguably eliminate or curtail the collateral source rule, which provides that a personal injury claimant's recovery is not to be reduced by the amount of compensation received from other sources, such as sick leave or insurance.<sup>29</sup>

The response of some compensation carrier attorneys to *Heifetz* has been to read the decision broadly and to proceed as if the decision requires them to assign their interests under section 102.29 to the plaintiff-employee in the third party liability action in cases where the employer or compensation insurer is not joined together with the employee as a party. This response is evidenced by some attorneys not only pleading the existence of an assignment, but also, by direct citation to the pronouncements of *Heifetz* itself.<sup>30</sup>

It is the opinion of the author that *Heifetz* does not require that an assignment be given prior to the expiration of the statute of limitations in order for section 102.29 distribution to be available to the nonparty compensation carrier since *Heifetz* is

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27. See generally Barron, "*Heifetz*" and the Collateral Source Rule, 48 Wis. B. BULL. 27 (1975).

28. 61 Wis.2d at 124, 211 N.W.2d at 841.

29. See generally Barron, "*Heifetz*" and the Collateral Source Rule, 48 Wis. B. BULL. 27 (1975), and Payne v. Bilco, 54 Wis.2d 424, 433, 195 N.W.2d 641, 647 (1972), regarding the definition of the collateral source rule.

30. One such pleading recently encountered by the author came with a copy of the assignment agreement attached and stated:

[A]t time of trial, the [workmen's compensation carrier] will assign its further subrogation interest for additional payments under the workmen's compensation policy to the time of trial to [the employee]. These assignments are made so as to fully protect the plaintiffs and the [workmen's compensation carrier] because of the pronouncements of the Wisconsin Supreme Court in the case of *Heifetz v. Johnson*, 61 Wis.2d 111, 211 N.W.2d 834 (1973), with the assignments having been made within the time prescribed by law.

Copy on file with the author. See also *Richtman v. Honkamp*, 245 Wis. 68, 13 N.W.2d 597 (1944), wherein the court held that the amount which the employer or insurer is authorized to receive out of the amount recovered against the party for injuries of the employee is not only the amount already paid out under compensation award, but the amount for which the employer or insurer is liable in future benefits to the injured employee.



distinguishable on its facts. The insurer in *Heifetz* was not a worker's compensation insurer.<sup>31</sup> Its rights were derived from the subrogation receipt and assignment executed by its insured, Heifetz. Worker's compensation insurers, on the other hand, derive their rights directly from section 102.29, which gives an employer or compensation carrier a statutory right and a fixed formula for a monetary recovery. The statutory distribution formula found in section 102.29(1) binds the employee, insurance carrier and third party tort-feasor to a distribution which does not permit collateral source recovery. Under section 102.29(1), if the notice provision is complied with<sup>32</sup> both the employee and employer or insurance carrier become bound by a formula which does not permit, and which did not permit prior to *Heifetz*, the employee to receive that portion of the recovery representing the amount of worker's compensation benefits paid.

In addition, the language of section 102.29 arguably makes a third party action unique and distinguishable from *Heifetz*. Nothing in the language of section 102.29 requires the giving of an assignment as a condition precedent to receiving section 102.29 distribution. An examination of section 102.29(1) reveals that notice is the only condition precedent to participation in the distribution. Applying the principle of statutory construction *expressio unius est exclusio alterius* it is arguable that the legislature intended to make notice the only condition precedent.

The conclusion that an assignment given prior to the expiration of the statute of limitations is not a condition precedent to receiving section 102.29 distribution is also reinforced by the legislative history behind section 102.29.<sup>33</sup>

Prior to 1931, section 102.29(1) provided that the making of a claim under the worker's compensation act against an employer or worker's compensation carrier by an employee oper-

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31. A first plea in abatement, grounded on the plaintiff's failure to allege that notice was given to the plaintiff's worker's compensation carrier or that the carrier had waived its right to participate under §102.29(1), was abandoned when it was learned that the plaintiff's worker's compensation insurer had, prior to the commencement of the personal injury action, assigned to the plaintiff all claims against the defendants to recover amounts paid or to be paid as benefits to the plaintiff. 61 Wis.2d at 113-14, 211 N.W.2d at 836.

32. See discussion regarding notice *infra* at 100.

33. See generally Arnold, *Third Party Actions and Products Liability*, 46 MARQ. L. REV. 135 (1962), for a discussion of the legislative history of Wis. STAT. §102.29 (1973).

ated as an assignment of the third party action to the carrier or employer, and that any excess recovered by the employer or carrier would go to the injured employee after deducting the reasonable costs of collection. The injured employee could only institute an action if the insurance carrier or employer failed to pursue a third party action upon demand.<sup>34</sup>

In 1931, the term "assignment" was removed and the injured employee was given the right to bring a third party action and the employer or carrier became entitled to "reasonable notice and opportunity to join in such action."<sup>35</sup> The Wisconsin court in *Employers Mutual Liability Insurance Co. v. Icke*,<sup>36</sup> commenting on the legislative history behind section 102.29, stated as follows:

By the amendment in 1931, the employer and insurance carrier were no longer regarded as assignees, nor was the employer regarded as an assignor. An independent right of action was given under the conditions stated in the statute to the employer and insurance carrier. No doubt this was done in an effort to avoid the legal implications involved in the transaction denominated an assignment, and to prevent, in

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34. WIS. STAT. §102.29(1)(a) (1929) provided, in part:

The making of a lawful claim against an employer or compensation insurer for compensation under sections 102.03 to 102.34 for the injury or death of an employe shall operate as an assignment of any cause of action in tort which the employe or his personal representative may have against any other party for such injury or death; and such employer or insurer may enforce in their own name or names the liability of such other party for their benefit as their interests may appear. . . . The failure of the employer or compensation insurer in interest to pursue his remedy against the third party within ninety days after written demand by a compensation beneficiary, shall entitle such beneficiary or his representatives to enforce liability in his own name, accounting of the proceeds to be made on the basis above provided.

35. WIS. STAT. §102.29(1)(a) (1929) was altered by ch. 132, §§ 1 and 2, [1931] Wis. Laws 255 to provide as follows:

(1) (a) The making of a claim for compensation against an employer or compensation insurer for the injury or death of an employe shall not affect the right of the employe or his personal representative to make claim or maintain an action in tort against any other party for such injury or death, but the employer or his insurer shall be entitled to reasonable notice and opportunity to join in such action. If they or either of them join in such action, they shall be entitled to repayment of the amount paid by them as compensation as a first claim upon the net proceeds of such action (deducting the reasonable costs of collection) in excess of one-third of such net proceeds, which shall be paid to the employe in all cases.

36. 225 Wis. 304, 274 N.W. 283 (1937). *Icke* held that an employee is entitled to share in the recovery against a third party whether suit is begun by the employee, employer, or insurance carrier regardless of joinder.

cases where the employer or insurance carrier did not assert a claim against a third party, the necessity of a reassignment to the injured employee in order to entitle the employee to maintain the action.<sup>37</sup>

Inasmuch as the legislative history behind section 102.29 abandoned an assignment as a prerequisite to distribution, the present statute should be construed as not requiring an assignment to be given in order to receive section 102.29 distribution. Notice should be the only condition precedent to receiving section 102.29 distribution in third party actions commenced prior to January 1, 1976, the effective date of chapter 803 of the Wisconsin Rules of Civil Procedure. If such notice is given, section 102.29(1) provides for distribution under the statutory formula irrespective of whether or not all parties join in the prosecution of the claim.

In short, the language of the statute does not require that an assignment be given in order for a nonparty employer or compensation carrier to receive section 102.29 distribution. However, this conclusion has not been accepted by some attorneys and judges handling third party actions, as evidenced by the continued practice of assignments and the insistence by some courts that such assignments are necessary in order for a compensation carrier to receive section 102.29 distribution. Thus, as with the question of party joinder discussed above, the interpretation and application of section 102.29 in third party actions not governed by chapter 803 of the new civil procedure rules has not been uniform.

### *C. Notice Required Pursuant to Section 102.29*

Another aspect of third party action procedure which has created substantial problems concerns the notice required by section 102.29(1) to be given by the party who has made a claim or commenced a third party action to the other interested party.

The relevant portion of section 102.29(1) provides in part (with emphasis placed on the problem areas):

The making of a claim for compensation against an employer or compensation insurer for the injury or death of an employee shall not affect the right of the employee, the employee's personal representative, or other person entitled to bring action,

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37. *Id.* at 307-08, 274 N.W. at 285.

to make claim or maintain an action in tort against any other party for such injury or death, hereinafter referred to as a third party. . . . The employer or compensation insurer who shall have paid or is obligated to pay a lawful claim under this chapter shall have the same right to make claim or maintain an action in tort against any other party for such injury or death. *However, each shall give to the other, reasonable notice and opportunity to join in the making of such claim or the instituting of an action and to be represented by counsel.* If a party entitled to notice cannot be found, the department shall become the agent of such party for the giving of notice as required in this subsection and the notice, when given to the department, shall include an affidavit setting forth the facts, including the steps taken to locate such party. . . . *If notice is given as provided in this subsection, the liability of the tort-feasor shall be determined as to all parties having a right to make claim, and irrespective of whether or not all parties join in prosecuting such claim, the proceeds of such claim shall be divided [according to the statutory formula].*

An examination of the above-quoted portion of section 102.29 raises the following crucial questions: (1) Who is required to have notice; (2) For what purpose is notice given; and (3) By what time must such notice be given? These questions can be conveniently discussed through an analysis of *Achtziger v. Christian*,<sup>38</sup> an unpublished written decision rendered by a Milwaukee County circuit court.

*Achtziger* involved a third party action brought by an injured employee which was settled prior to trial for the sum of \$16,000.00. Liberty Mutual Insurance Co., the worker's compensation carrier, had made compensation payments under chapter 102 in the amount of \$2,208.04. Since section 102.29 requires court approval of all settlements in third party actions,<sup>39</sup> the plaintiff moved for court approval of the settlement. Plaintiff also requested that the compensation carrier, under the circumstances of the case, be foreclosed from claiming any reimbursement for those monies paid on the plaintiff's behalf.

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38. Case no. C 400-263 (Milwaukee County Cir. Ct., Milwaukee, Wisconsin, May 17, 1974).

39. Wis. STAT. §102.29(1) (1973) concludes with the following sentence: "A settlement of any third party claim shall be void unless said settlement and the distribution of the proceeds thereof is approved by the court before whom the action is pending and if no action is pending, then by a court of record or by the department."

Liberty was never given notice by the plaintiff so as to afford Liberty the opportunity to join in the prosecution of the claim. On this ground, Liberty appeared by counsel to oppose the plaintiff's motion and request that the court permit Liberty to participate in the proceeds of the settlement.

The court held for the plaintiff, thereby foreclosing Liberty from participating in the distribution of the settlement proceeds. The court reasoned that section 102.29 distribution is conditioned upon giving notice either by the employee or the employer (depending on which party commenced the action) in concluding that Liberty was not entitled to reimbursement. In its decision, the court stated as follows:

The wording of sec. 102.29(1), Wis. Stats., does, in the court's opinion, create somewhat of an anomalous situation in that a suing party, whether it be the employee or the employer, appears to be rewarded by the failure to give notice as provided in the statute. The plain sense of the statute is that either party shall notify the other of his intention to commence an action against the tortfeasor; however, we find no sanction for the failure to give notice. The opposite appears to be true. . . [citing 102.29(1)].

The language [of section 102.29(1)] is certainly not equivocal or ambiguous. It is undisputed in this case that Liberty never received notice from Achtziger of the pendency of his action against the tortfeasor. We find no language in 102.29 which gives Liberty any aid and comfort to support their present contention that they are now entitled to participate.<sup>40</sup>

The court also interpreted the *Heifetz v. Johnson* case as precluding the injured employee-plaintiff from collateral source recovery of the amounts paid by the compensation carrier under chapter 102. The court found significance in the fact that Liberty, having equal rights with the injured employee-plaintiff to commence a third party action, declined to act on those rights. Following the *Heifetz* rationale, the court then held that the cause of action of Liberty had been laid to rest by the statute of limitations.<sup>41</sup>

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40. See note 38 *supra*.

41. The authors of a recent article on the new Wisconsin Rules of Civil Procedure point out that the effect of § 803.03(2) should be to eliminate the *Heifetz* statute of limitations problem which is created when the holder of one "part" of a cause of action commences an action without joining as plaintiffs the possessors of the other parts of

Of little consolation to Liberty was the court's advice to worker's compensation insurers in third party actions:

Apparently the only safe course for a compensation carrier, absent notice, is either to commence an action on its own, which admittedly was not done here, join in the lawsuit with the employee, as the statute provides, or assign to the employee whatever rights the compensation carrier has and allow him to prosecute the action as an assignee.<sup>42</sup>

The attorney for Liberty argued that the statutory language stating that "each [third party claimant] shall give to the other reasonable notice" was mandatory, requiring the plaintiff in absolute terms to give reasonable notice and opportunity to join in the making of a claim.<sup>43</sup> Noting that the plaintiff had admitted that the statutory directive had not been followed, counsel for Liberty further argued:

The plaintiff now attempts to take advantage of his failure to give such notice by asking the court to award to him the entire proceeds of settlement without recognizing the compensation carrier's payments to him and on his behalf by way of medical expenses. It would appear to be completely without merit to allow the plaintiff to deliberately fail to comply with the deliberate mandate of the Statute and then turn around and take advantage of his own non-compliance.<sup>44</sup>

The solution suggested by Liberty's counsel was to construe the notice portion of section 102.29 as eliminating notice as a prerequisite to participation in the proceeds distribution. This construction could be facilitated, in Liberty's view, by treating the notice provision of section 102.29 as two separate sentences. That is, to change section 102.29(1) as it now stands:

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the same cause of action and the statute of limitations runs on the nonjoined parties. Under ch. 803, the entire claim, including all of its constituent parts, is commenced with the filing of a summons provided that within a reasonable time after objection is made the other parties holding parts of the claim ratify the plaintiff's commencement of the action or are themselves joined or substituted in the action. Clausen and Lowe, *The New Wisconsin Rules of Civil Procedure: Chapters 801-803*, 59 MARQ. L. REV. 1, 86-90 (1976); see also WIS. STAT. §803.01 (1973).

42. See note 38 *supra*. It should be noted that *Achtziger* was governed by the old civil procedure rules and thus the options after joinder spelled out in WIS. STAT. §803.03(2)(b) (1973) were not available to the court for use in the case. Yet the alternatives suggested by the court for compensation carriers to choose from are remarkably similar to the subsequently adopted options in WIS. STAT. §803.03 (2)(b) (1973).

43. Letter brief on behalf of Liberty Mutual Insurance Co., dated May 24, 1974.

44. *Id.*

If notice is given as provided in this subsection, the liability of the tort-feasor shall be determined as to all parties having a right to make claim, and irrespective of whether or not all parties join in prosecuting such claim, the proceeds of such claim shall be divided [according to the statutory formula].

to read as follows:

If notice is given as provided in this subsection, the liability of the tort-feasor shall be determined as to all parties having a right to make claim. Irrespective of whether or not all parties join in prosecuting such claim, the proceeds of such claim shall be divided [according to the statutory formula].<sup>45</sup>

Following the court's decision in *Achtziger*, and in light of the arguments submitted by Liberty, the parties settled their differences, with Liberty accepting fifty percent of its section 102.29 share.

The interpretation advocated above by counsel for Liberty, appears to be logical and consistent with the statutory intent of providing a just division of third party liability proceeds while avoiding an inadvertent benefit to plaintiffs who fail to comply with the statutory mandate for notice.

In the author's opinion, the lack of timely notice relates entirely to the question of selection of counsel and control of the litigation— not the right to receive distribution under section 102.29.<sup>46</sup> Section 102.29 distribution should be given to any party receiving notice prior to actual distribution.

Permitting section 102.29 distribution to any party receiving notice prior to distribution would also be in line with the policy goal of protecting the tort-feasor from paying once to the insured and once again to the insurer for the same injury, as well as the policy goal of promoting judicial economy and efficiency.<sup>47</sup>

In addition, permitting section 102.29 distribution to any party receiving notice prior to actual distribution is in accordance with the realities of a third party action. Obviously, the

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45. *Id.*

46. See *Johannsen v. Peter P. Woboril, Inc.*, 260 Wis. 341, 51 N.W.2d 53 (1952), where the Wisconsin court commented that the decision to join in a third party action goes only to participation in the litigation.

47. See *Patitucci v. Gerhardt*, 206 Wis. 358, 240 N.W. 385 (1932).

injured employee and his attorney have actual knowledge that compensation indemnity has been paid. In addition, the compensation insurer or employer likewise knows that a compensation payment has been made. The only party who may not be aware of the fact that compensation indemnity has been paid is the third party tort-feasor defendant. Notice, prior to distribution, would protect that tort-feasor.<sup>48</sup>

Finally, permitting section 102.29 distribution as outlined above, would not result in a windfall to the attorney representing a worker's compensation carrier which, for example, did not join in the pressing of the third party claim until the day of distribution. Section 102.29(1) provides:

If both the employee or the employee's personal representative or other person entitled to bring action, and the employer or compensation insurer, join in the pressing of said claim and are represented by counsel, the attorneys' fees allowed as a part of the costs of collection shall be, unless otherwise agreed upon, divided between such attorneys as directed by the court or by the department.

If the attorney representing the worker's compensation carrier did nothing but step in on the day of the distribution, for example, his share of the total attorneys' fees allowed should be minimal, or nonexistent.

A suggested solution to the *Achtziger* problem would be to permit section 102.29 distribution to all parties who receive notice<sup>49</sup> at any time prior to the actual distribution of proceeds. Such an interpretation of section 102.29 would be reasonable since it would prevent a noncomplying plaintiff from being awarded for his failure to give notice that an action had been commenced, and, at the same time, protect the tort-feasor from vexatious litigation by binding all participants who have received notice to the distribution.

An additional problem remains, however, since late notice may, as a practical matter, prevent the absent compensation carrier from adequately protecting its interests in the event

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48. See *Doyle v. Teasdale*, 263 Wis. 328, 57 N.W.2d 381 (1953).

49. This article does not discuss the question of what constitutes sufficient notice. In this regard, reference to the analogous situations in *Wolff v. Sisters of St. Francis of Holy Cross*, 41 Wis.2d 594, 164 N.W.2d 501 (1969), *Holmgren v. Strebis*, 54 Wis.2d 590, 196 N.W.2d 655 (1971), and *Johannsen v. Peter P. Woboril, Inc.*, 260 Wis. 341, 51 N.W.2d 53 (1952), may be helpful.



that settlement negotiations are being conducted. In particular, if the negotiated settlement is not sufficiently large to cover the full reimbursement to which the compensation carrier is entitled under the statute, the compensation carrier would, for all intents and purposes, have lost its equal voice in the control of the claim. Perhaps the solution to this problem would be to require the consent of the compensation carrier receiving late notice to any settlement to be approved by the court pursuant to section 102.29(1), or at least a showing by the plaintiff that the settlement is equitable, having the interests of the compensation carrier in mind.<sup>50</sup>

In short, judicial or legislative clarification of the problems posed by *Achtziger* should be pursued along some of the above-suggested lines.

## II. CHAPTER 803 AND ITS EFFECT ON THIRD PARTY ACTIONS— THE CONFLICT IN THE JOINDER REQUIREMENTS OF SECTIONS 102.29(1) AND 803.03

The advent of the new Wisconsin Rules of Civil Procedure<sup>51</sup> requires a reexamination of the joinder problem in third party actions. As noted above, it is the author's opinion that, in spite of some practice to the contrary, the clear language of section 102.29(1) itself, and the case law construing that section, establish that if notice requirements are met, all parties having a right to make claim under section 102.29 share in the distribution of proceeds irrespective of their joinder or nonjoinder. However, the effect of new rule 803.03(2) may be to require joinder in all cases, notwithstanding the language of section 102.29(1).

Although section 803.03 is based on Federal Rule 19, as amended in 1966, subsection (2) of section 803.03 is entirely new.<sup>52</sup> That subsection provides as follows:

### (2) CLAIMS ARISING BY SUBROGATION, DERIVATION AND ASSIGNMENT.

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50. Note that Wis. STAT. §102.29(4) (1973) provides for the voiding of any settlement in the event that notice of insurance coverage or common control is not given. Note also that *Rice v. Gruetzmacher*, 30 Wis.2d 222, 140 N.W.2d 238 (1966), holds that a court can look at equitable considerations in determining the share of proceeds in a § 102.29(4) situation.

51. See note 10 *supra*.

52. See Clausen and Lowe, *The New Wisconsin Rules of Civil Procedure: Chapters 801-803*, 59 MARQ. L. REV. 1, 81 (1976).

(a) *Joinder of related claims.* A party asserting a claim for affirmative relief *shall join as parties* to the action all persons who at the commencement of the action have claims based upon subrogation to the rights of the party asserting the principal claim, derivation from the principal claim, or assignment of part of the principal claim. For purposes of this section, a person's right to recover for loss of consortium shall be deemed a derivation right. Any party asserting a claim based upon subrogation to part of the claim of another, derivation from the rights or claim of another, or assignment of part of the rights or claim of another *shall join as a party* to the action the person to whose rights he is subrogated, from whose claim he derives his rights or claim, or by whose assignment he acquired his rights or claim.

(b) *Options after joinder.* Any party joined pursuant to par. (a) may 1. participate in the prosecution of the action, 2. agree to have his interest represented by the party who caused his joinder, or 3. move for dismissal with or without prejudice. If the party joined chooses to participate in the prosecution of the action, he shall have an equal voice with other claimants in such prosecution. If he chooses to have his interest represented by the party who caused his joinder, he shall sign a written waiver of his right to participate which shall express his consent to be bound by the judgment in the action. Such waiver shall become binding when filed with the court, but a party may withdraw his waiver upon timely motion to the judge to whom the case has been assigned with notice to the other parties. A party who represents the interest of another party and who obtains a judgment favorable to such other party may be awarded reasonable attorneys fees by the court. If the party joined moves for dismissal without prejudice as to his claim, he shall demonstrate to the court that it would be unjust to require him to prosecute his claim with the principal claim. In determining whether to grant the motion to dismiss, the court shall weigh the possible prejudice to the movant against the state's interest in economy of judicial effort.

(c) *Scheduling and pre-trial conferences.* At the scheduling conference and pre-trial conference, the judge to whom the case has been assigned shall inquire concerning the existence of and joinder of persons with subrogated, derivative or assigned rights and shall make such orders as are necessary to effectuate the purpose of this section [emphasis added].

The Research Reporter for the Judicial Council Committee stated in his "Commentary to Proposed Rules of Civil Procedure":

Sub. (2) of the proposed rule is new. It requires claimants to join as parties to the action all persons who [have] claims based on subrogation to, derivation from, or assignment of a part of the claimant's claim. The underlying philosophy of sub. (2) is that all related rights of action arising out of a single cause of action should be asserted in a single action. See *Borde v. Hake*, 44 Wis.2d 22, 170 N.W.2d 768 (1969), for the distinction between rights of action and causes of action. The proposed subsection is seen by the revision committee as a rather natural expansion of the philosophy underlying s. 102.29 dealing with workmen's compensation cases.<sup>53</sup>

The Judicial Council Committee's Note, which appears in the statutes following section 803.03, is slightly different. It states:

Sub. (2) is new. It is intended to foster economy of judicial effort by requiring that all "parts" of a single cause of action whether arising by subrogation, derivation or assignment, be brought before the court in one action. It supplements the provisions of s. 102.29 concerning third party liability in workmen's compensation cases.<sup>54</sup>

An examination of the above commentaries, coupled with a close examination of the language of section 803.03(2), raises two crucial questions:

(1) Is a 102.29 third party claim a claim based upon "subrogation to part of the claim of another, derivation from the rights or claim of another, or assignment of part of the rights or claim of another," so as to result in section 803.03(2) controlling the procedural handling of such a claim?

(2) If section 803.03(2) does control the procedural handling of a third party action under the Worker's Compensation Act, does not section 803.03(2)'s mandatory joinder requirement conflict with section 102.29(1), and case law construing that section which provides for statutory distribution of proceeds if notice requirements are met, irrespective of the joinder or nonjoinder of all parties having a right to make a claim?

A worker's compensation third party claim is difficult to

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53. 3 W. HARVEY, WISCONSIN PRACTICE § 3041 (1975).

54. In adopting Wis. STAT. § 803.03(2) (1973), the drafters presumably considered the policy reasoning which guided the decisions in *Patitucci v. Gerhardt*, 206 Wis. 358, 240 N.W. 385 (1932), and *Heifetz v. Johnson*, 61 Wis.2d 111, 211 N.W.2d 834 (1973).

Note that the Judicial Council Committee's Note speaks in terms of economy of judicial effort, a basic premise underlying the court's decision in *Patitucci*.

categorize as being based on "subrogation," "derivation," or "assignment," since a worker's compensation third party claim is arguably a unique statutory cause of action unlike more traditional subrogated causes of action. Yet, a finding that section 102.29(1) claims are based on "subrogation," "derivation" or "assignment" is necessary in order to render section 803.03(2) applicable. This question will remain unresolved until Wisconsin courts are faced with the statutory conflict.

Accordingly, the remainder of this article will discuss the potential applicability of section 803.03(2). More particularly, arguments will be raised both pro and con regarding the question of whether or not section 803.03(2) governs the procedural handling of a section 102.29 third party action.

Proponents of the position that section 803.03(2) is controlling might argue that a third party worker's compensation claim meets the definition of subrogation, derivation or assignment under section 803.03(2). Arguably, section 102.29(1) provides for "automotive subrogation."<sup>55</sup> In addition, proponents of this position might further argue that a cause of action brought under section 102.29 is derivative in character, relying on some case law which suggests that proposition.<sup>56</sup>

In spite of these arguments that a section 102.29(1) action falls within the definitional language of section 803.03, there is, in this author's opinion, an equally strong argument in support of the position that section 803.03(2) does not govern the procedural handling of a section 102.29 third party action.

A proponent of the position that section 803.03(2) is inapplicable might argue that a section 102.29 third party action is distinguishable in that the section 102.29 cause of action is a unique statutory cause of action unlike the traditional subro-

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55. Judge Barron developed the "automatic subrogation" concept in a recent article regarding the collateral source rule. See note 27 *supra*.

56. *Shelby Mut. Ins. Co. v. Home Mut. Ins. Co.*, 25 Wis.2d 25, 32, 130 N.W.2d 296, 299-300 (1964), states:

Furthermore, the holdings in . . . *London Guarantee & Accident Co. v. Wisconsin Public Service Corp.*, [228 Wis. 441, 279 N.W. 76 (1938)], and *Employers Mut. Liability Ins. Co. v. Icke*, [225 Wis. 304, 274 N.W. 283 (1937)] . . . are of such long standing that they import legislative acquiescence and acceptance of the principle that a cause of action brought under sec. 102.29 (2), Stats., is derivative in character.

While it is arguable that a claimant's right of action under §102.29 meets the definitional requirements of "subrogation" and/or "derivation," it is doubtful that a strong argument can be made that the definitional requirement of an "assignment" is met in light of the legislative history behind § 102.29. See note 33 *supra*.

gated claim. *Shelby Mutual Insurance Co. v. Girard Steel Supply Co.*,<sup>57</sup> for example, summarized the argument in support of the unique character of section 102.29(2) as follows:

[T]he Supreme Court of Wisconsin recognizes that the third party's liability is grounded in tort and not contract. The fact that the insurer's cause of action is created by statute and is not derivative in the sense that it is based on a contractual theory of assignment or subrogation, does not afford the insurer a more advantageous position than that enjoyed by the injured employee under tort law or his representatives under a wrongful death statute. While the cause of action created under this section is independent of and in addition to a cause of action under tort law or one created by a wrongful death statute, the action is derivative in the sense that these actions are predicated upon the common negligent conduct of a third party, and, in the absence of any wrongdoing, there can be no recovery.<sup>58</sup>

In short, when section 102.29(1) states that an employer shall have the "right to make claim or maintain an action in tort against any other party for such injury or death,"<sup>59</sup> it is arguable that this right is an independent right which, while derivative in the sense that the right to recover is predicated on the common negligent conduct of the third party, it is not derivative within the meaning of section 803.03(2).<sup>60</sup>

In addition, proponents of the position that section 803.03(2) does not govern the procedural handling of a section 102.29 third party action might further argue that the policy goals of section 803.03(2) have already been satisfied by the protections built into section 102.29, and that the drafters of section 803.03(2) never intended to include a section 102.29

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57. 224 F. Supp. 690 (D. Minn. 1964).

58. *Id.* at 694.

59. Wis. STAT. §102.29(1) (1973).

60. See note 56 *supra*. See also *Employers Mut. Liab. Ins. Co. v. Icke*, 225 Wis. 304, 274 N.W. 283 (1937), wherein the court, considering the 1939 version of §102.29, held that the employer had an independent right to bring a third party action, even though such right was derivative in nature; and *Rice v. Gruetzmacher*, 30 Wis.2d 222, 140 N.W.2d 238 (1966), wherein the court considered §102.29(4), distinguished the Pennsylvania worker's compensation statute from Wisconsin's worker's compensation statute, and noted that "[t]he Pennsylvania statute gives a right of subrogation to the workmen's compensation carrier, while the Wisconsin statute gives such carrier a statutory right in a fixed formula for a monetary recovery." 30 Wis.2d at 228, 140 N.W.2d at 241. Finally, See 2A A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §§75.10 and 75.40 (1976).

situation within the ambit of section 803.03(2).

The Judicial Council Committee Note following section 803.03(2) states that the new statute "is intended to foster economy of judicial effort by requiring that all 'parts' of a single cause of action whether arising by subrogation, derivation, or assignment, be brought before the court in one action." Each party to be joined is given an "equal voice" in the prosecution of the action under section 803.03(2)(b).<sup>61</sup>

In support of the position that all policy goals underlying section 803.03(2) have already been met under section 102.29(1), it should be noted that parties receiving notice have, pursuant to section 102.29, an "equal voice" in the prosecution of the third party claim. In addition, a certain degree of "economy of judicial effort" has already been accomplished under section 102.29 since, if notice is given, all parties having a right to make a claim are entitled to a statutory distribution, irrespective of joinder.

In conclusion, it is unclear at this time whether or not section 803.03(2) would control the procedural handling of a third party action, insofar as joinder is concerned. The question has practical significance since both the employee and the employer, or compensation insurer, tactically would not want the employer, or compensation insurer, to be a party to the action since a jury might be more sympathetic to the injured worker if the jury was unaware of the employer's or insurer's involvement. A cautious attorney should raise the question of joinder at the scheduling and/or pretrial conferences since some courts may require joinder and others may not.<sup>62</sup> Ultimately, judicial or legislative clarification will be necessary in order to resolve the conflict between sections 803.03(2) and 102.29(1).

### CONCLUSION

The interpretation and application of section 102.29 in third party actions commenced prior to January 1, 1976, has not

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61. See note 54 *supra*.

62. The court is required by Wis. STAT. §803.03(2)(c) (1973) to raise the question at the pre-trial conferences:

(c) *Scheduling and pre-trial conferences.* At the scheduling conference and pre-trial conference, the judge to whom the case has been assigned shall inquire concerning the existence of and joinder of persons with subrogated, derivative or assigned rights and shall make such orders as are necessary to effectuate the purpose of this section.

been uniform. Judicial and/or legislative attention is needed in order to resolve the questions posed by section 102.29 with respect to joinder, notice and the necessity of assignments of interests.

The effect of section 803.03 on the handling of worker's compensation third party actions commenced after January 1, 1976, is not settled at this time. A conflict exists between section 102.29 and section 803.03. Judicial and/or legislative attention is needed in order to resolve the conflict presented.